Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-650 OF 2000

RAMLY ALI J

27 SEPTEMBER 2002

Civil Procedure *— Amendment — Order — Power of court to recall an unperfected order — Application by plaintiff to amend court order so as to include contractual interest — Judgment was given for principal sum only after plaintiff's counsel informed the court that he was seeking judgment for principal amount and was willing to forgo contractual interest — Whether order clearly reflected what was intended by judge after being told by the plaintiff's counsel that plaintiff was willing to waive contractual interest — Whether the order had been perfected — Whether this was a proper case to amend or vary court order*

This was an application by the plaintiff to amend an earlier court decision dated 14 May 2002 ('the said court order') to include a new item, namely, 'interest on the amount RM40,796.25 at the rate of 2% per month from 14 October 1998 up to 14 May 2002'. The plaintiff had supplied plastic resin to one Meister Plastic Industries (M) Sdn Bhd ('MPI') on credit terms, vide a credit sale letter. Among the terms of the credit sale letter was that interest at the rate of 2% per month was payable in respect of late payments. The credit facility was guaranteed by the defendants. Upon MPI's failure to make payment as agreed, the plaintiff sued the defendants in the sessions court for the sum of RM43,383.23 (made up of RM40,796.25 as principal and the balance as interest at the rate of 2% per month). At the sessions court, the plaintiff applied to enter summary judgment against the defendants under O 26A of the Subordinate Courts Rules 1980. The learned sessions court judge dismissed the application on the ground that there were triable issues. The plaintiff then filed an appeal to the judge in chambers. The learned judge allowed the appeal with cost, but only for the sum of RM40,796.25 with interest at 8% per annum from the date of the order until the date of full settlement. A draft order was prepared by the plaintiff's counsel to that effect and the same was approved by the defendants' counsel. From the notes of proceedings before the judge in chambers, it appeared that the plaintiff's counsel had informed the judge that there was no triable issue in the plaintiff's claim as the defendants had not disputed the principal amount claimed but only the interest charged. The plaintiff's counsel then told the court that the plaintiff was willing to waive the entire interest claimed, and sought judgment for the principal sum only. In this application by the plaintiff to amend the earlier court order, the plaintiff's counsel stated that it was a mistake on the part of the counsel for the plaintiff to waive the entire interest as his intention was to waive the post judgment interest but not pre-judgment interest.

Held, dismissing the plaintiff's application:

(1) An order pronounced by a court can be withdrawn, altered, or modified by the same court until it was drawn up, passed and perfected. When a court had pronounced judgment, it retained control over the case until the order giving effect to its judgment was formally perfected; such control however, must be used in accordance with judicial discretion. Prior to the perfection of the order, the question of 'functus officio' would not arise. Once the order was approved by the court registrar, the fair or formal order would be prepared and sent to the court registrar for attestation and affixing of the court seal. Only at that stage of the process can an order be said to have been passed and entered or perfected (see pp 626G–H, 627D-G); *Owners of Cargo Carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' (No 2)* [1998] 6 MLJ 492 followed.

(2) The power to amend or vary an order earlier granted, was not without limitations. It must be exercised judicially and not capriciously. Further, it must only be exercised in exceptional cases where the justice of the case required. In exercising the power to amend or vary an order, the court must look at the intention of the earlier court in pronouncing the order. The court may exercise the power in order to bring it into harmony with the order which the earlier court had obviously intended or meant to pronounce (see pp 627G–H, 628G).

(3) It was not in dispute that the said court order had not been perfected. Even though the draft order was prepared by the plaintiff's counsel and later approved by the defendants' counsel, the draft order had not been passed and entered by the court registrar. Therefore, this court had an inherent power to amend or vary the said court order as it had not been perfected or passed and entered (see p 629C–D).

(4) In the instant case, in order to obtain summary judgment against the defendants, the plaintiff had to convince the court (at the sessions court as well as in the High Court) that the plaintiff's case was plain and obvious and that there were no triable issues to be tried. The defendants on the other hand had all along disputed the claim, in particular, on the question of interest at 2% per month. Hence, to convince the judge in chambers, the plaintiff's counsel had informed the learned judge that he was seeking judgment for the principal amount and was willing to forgo interest. This clearly showed that what the plaintiff's counsel had told the judge was not slip of his tongue. Therefore, the remedy under O 20 r 11 of the Rules of the High Court 1980 did not apply. There was no error or accidental omission in the order as pronounced by the judge as the order clearly reflected what was intended or meant by the judge after being told by the plaintiff's counsel that 'the plaintiff was willing to waive the entire interest claimed.'

Accordingly, it was not proper that to amend or vary the said court order (see pp 629F–G, 630A–D).

(5) The issue here was not whether the plaintiff was entitled to the interest claimed under the relevant agreement but whether the plaintiff was entitled to a claim which he had willingly, effectively and voluntarily waived in a proceeding. Therefore, the question of whether the plaintiff was entitled to the interest stated in the credit sale letter did not arise. Further, the issues of 'unjust enrichment' on part of the defendants or mistake on the part of the counsel for the plaintiff also did not arise. In any case, even if the plaintiff's counsel was mistaken, it was not within the scope of the power of the court to amend or vary the said court order having regard to the circumstances of the case (see pp 630I–631A, D); *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 followed.

[Bahasa Malaysia summary

Ini adalah satu permohonan plaintif untuk meminda keputusan mahkamah yang lebih awal bertarikh 14 Mei 2002 ('perintah mahkamah tersebut') untuk memasukkan butir baru, iaitu, 'interest on the amount RM40,796.25 at the rate of 2% per month from 14 October 1998 up to 14 May 2002'. Plaintif telah membekalkan resin plastik kepada sebuah syarikat yang dikenali sebagai Meister Plastic Industries (M) Sdn Bhd ('MPI') atas terma kredit, melalui sepucuk surat jualan kredit. Di antara terma surat jualan kredit adalah bahawa faedah pada kadar 2% sebulan harus dibayar berkaitan dengan bayaran lewat. Kemudahan kredit tersebut telah dijamin oleh defendan-defendan. Apabila MPI gagal membuat bayaran seperti yang dijanjikan, plaintif telah mendakwa defendan-defendan di mahkamah sesyen untuk jumlah sebanyak RM43,383.23 (yang terdiri daripada RM40,796.25 sebagai prinsipal dan selebihnya sebagai faedah pada kadar 2% sebulan). Di mahkamah sesyen, plaintif telah memohon untuk memasukkan penghakiman terus terhadap defendan-defendan di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980. Hakim mahkamah sesyen yang arif menolak permohonan tersebut atas alasan bahawa wujudnya isu-isu yang perlu dibicarakan. Plaintif kemudiannya memfail satu rayuan kepada hakim dalam kamar. Hakim yang arif membenarkan rayuan dengan kos, tetapi hanya untuk jumlah sebanyak RM40,796.25 dengan faedah pada kadar 8% setahun dari tarikh perintah sehingga tarikh bayaran penuh. Satu perintah draf telah disediakan oleh peguam plaintif dengan maksud itu dan telah diluluskan oleh peguam pihak defendan-defendan. Dari nota prosiding di hadapan hakim dalam kamar, peguam plaintif telah memaklumkan kepada hakim bahawa tiada isu yang perlu dibicarakan dalam tuntutan plaintif kerana defendan-defendan tidak mempertikaikan amaun prinsipal tetapi cuma faedah yang dikenakan. Peguam pihak plaintif kemudian memaklumkan

kepada mahkamah bahawa plaintif rela mengenepikan keseluruhan faedah yang dituntut dan memohon penghakiman untuk jumlah prinsipal sahaja. Dalam permohonan ini oleh plaintif untuk meminda perintah mahkamah tersebut, peguam pihak plaintif menyatakan bahawa adalah satu kesilapan pada pihak peguam plaintif untuk mengenepikan keseluruhan faedah kerana hasratnya adalah untuk mengenepikan faedah selepas penghakiman tetapi bukan faedah sebelum penghakiman.

Diputuskan, menolak permohonan plaintif:

(1) Satu perintah yang dikeluarkan oleh mahkamah boleh ditarik balik, ditukar atau diubahsuai oleh mahkamah yang sama sehingga ia dibuat, dilulus dan disempurnakan. Setelah mahkamah mengeluarkan penghakiman, ia tetap mengekalkan kawalan ke atas kes sehinggalah perintah yang memberikan kesan kepada penghakimannya disempurnakan secara rasmi; walau bagaimanapun, kawalan tersebut mestilah digunakan menurut budi bicara kehakiman. Sebelum penyempurnaan perintah tersebut, persoalan tentang 'functus officio' tidak akan timbul. Sebaik sahaja perintah diluluskan oleh pendaftar mahkamah, perintah patut atau rasmi akan disediakan dan dihantar kepada pendaftar mahkamah untuk pengesahan dan meletakkan meterai mahkamah. Hanya di peringkat proses ini barulah satu perintah boleh dikatakan telah dilulus dan dimasuk atau disempurnakan (lihat ms 626G–H, 627D-G); *Owners of Cargo Carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' (No 2)* [1998] 6 MLJ 492 diikut.

(2) Kuasa untuk meminda atau mengubah satu perintah yang telah diberikan terdahulu bukanlah tanpa had. Ia mesti dilaksanakan secara saksama dan bukan secara tidak menentu. Seterusnya, ia mesti dilaksanakan hanya dalam kes-kes yang sangat luar biasa di mana keadilan kes menghendakinya. Dalam melaksanakan kuasa untuk meminda atau mengubah sesuatu perintah, mahkamah mesti meneliti hasrat mahkamah terdahulu dalam mengeluarkan keputusan penghakiman atas perintah itu. Mahkamah boleh melaksanakan kuasa untuk menyelaraskannya dengan perintah yang jelas ingin dikeluarkan oleh mahkamah terdahulu (lihat ms 627G–H, 628G).

(3) Ia tidak dipertikaikan bahawa perintah mahkamah tersebut belum disempurnakan. Sungguhpun perintah draf telah disediakan oleh peguam pihak plaintif dan kemudiannya diluluskan oleh peguam pihak defendan-defendan, perintah draf tersebut masih belum diluluskan dan dimasukkan oleh pendaftar mahkamah. Maka, mahkamah ini mempunyai kuasa sedia ada untuk meminda atau mengubah perintah mahkamah tersebut kerana ia tidak disempurnakan atau diluluskan dan dimasukkan (lihat ms 629C–D).

(4) Dalam kes ini, untuk memperolehi penghakiman terus terhadap defendan-defendan, plaintif mestilah memuaskan mahkamah (di mahkamah sesyen serta Mahkamah Tinggi) bahawa kes plaintif adalah nyata dan jelas dan bahawa tiada isu yang perlu untuk dibicarakan. Sebaliknya, selama ini, defendan-defendan telah mempertikai tuntutan, khususnya atas persoalan faedah pada kadar 2% sebulan. Justeru itu, untuk meyakinkan hakim dalam kamar, peguam pihak plaintif telah memaklumkan kepada hakim yang arif bahawa beliau memohon penghakiman untuk amaun prinsipal sahaja dan sedia untuk melepaskan tuntutan bagi faedah. Ini jelas menunjukkan bahawa apa yang dimaklumkan oleh peguam pihak plaintif kepada hakim bukanlah tersilap kata. Oleh itu, remedi di bawah A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak terpakai. Tiada kesilapan atau peninggalan yang tidak disengajakan dalam perintah yang dikeluarkan oleh hakim kerana perintah tersebut jelas membayangkan apa yang dihasratkan atau dimaksudkan oleh hakim setelah diberitahu oleh peguam pihak plaintif bahawa 'the plaintiff was willing to waive the entire interest claimed'. Dengan itu, adalah tidak wajar untuk meminda atau mengubah perintah mahkamah tersebut (lihat ms 629F–G, 630A–D).

(5) Isu di sini bukanlah sama ada plaintif berhak mendapat faedah yang dituntut di bawah perjanjian relevan tetapi sama ada plaintif berhak kepada tuntutan yang mana beliau telah ketepikan secara rela hati, berkesan dan sukarela dalam satu prosiding. Oleh yang demikian, persoalan sama ada plaintif berhak menerima faedah yang dinyatakan dalam surat jualan kredit tidak timbul. Seterusnya, isu-isu tentang 'unjust enrichment' pada pihak defendan-defendan atau kesilapan oleh pihak peguam plaintif juga tidak timbul. Walau bagaimanapun, biarpun peguam pihak plaintif tersilap, ia tidak terletak dalam lingkungan kuasa mahkamah untuk meminda atau mengubah perintah mahkamah tersebut memandangkan keadaan kes (lihat ms 630I–631A, D); *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 diikut.]

Notes

For cases on amendment of court order, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 467–469.

Cases referred to

Chua Wah Keow v Ng Ho Huat & Anor [1961] 1 MLJ 321 (refd)

Harrison's Settlement, Re [1955] 1 All ER 185 (refd)

Huddersfield Banking Co Ltd v Henry Lister & Son Ltd [1895] 2 Ch D 273 (refd)

Inchcape (Earl of), Re, Craigmyle v Inchcape [1942] 1 Ch 394 (refd)

Ling Nam Rubber Works v Leong Bee & Co (No 2) [1968] 1 MLJ 265 (refd)
Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717 (refd)
Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' (No 2) [1998] 6 MLJ 492 (folld)
Pittalis & Ors v Sherefittin [1986] 2 All ER 227 (refd)
Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd [1991] 2 MLJ 417 (folld)
Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 MLJ 705 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 r 9, O 14 r 11, O 19 r 9, O 20 r 11
Subordinate Courts Rule 1980 O 26A

Appeal from: Summons No 8–52–22281 of 1998 (High Court, Kuala Lumpur)

Cheah Poh Gek (*Cheah Poh Gek & Assoc*) for the appellant.
Lee Sze Yin (*ST Lee & Partners*) for the respondents

Ramly Ali J: This is an application by the appellant/plaintiff (vide encl 10) to amend an earlier court decision dated 14 May 2002 to include a new item, ie 'interest on the amount RM40,796.25 at the rate of 2% per month from 14 October 1998 up to 14 May 2002'.

The full prayers in the said application are as follows:

(1) that the court revise or allow hearing (if necessary) on the issue of interest;
(2) that the appellant be allowed to amend the order given on 14 May 2002;
(3) that amendment be included as follows:
    (a) 'faedah ke atas jumlah RM40,796.25 pada kadar 2% sebulan daripada 14 Oktober 1998 sehingga 14 Mei 2002';
(4) that costs of the application be in the cause.

Factual background

The appellant/plaintiff, at all material times, was a supplier of plastic resin. The appellant/plaintiff supplied the products to one Meister Plastic Industries (M) Sdn Bhd on credit terms, up to the maximum value of RM100,000 vide a credit sale letter dated 4 May 1998, which was signed by the first respondent who was a director of Meister Plastic Industries, for and on behalf of the said company. Among the terms of the said sale letter is that Meister Plastic Industries was given a credit facility up to an amount of RM100,000 upon a credit term of 60 days whereupon all outstanding amounts were subject to interest at the rate of 2% per month.

The said credit facility was guaranteed by a letter of guarantee duly executed by the three respondents/defendants, as guarantors who had

agreed jointly and severally to guarantee the debt for a maximum sum of RM120,000.

The said products were supplied and delivered to Meister Plastic Industries as listed in the relevant invoices which have been acknowledged receipt. Meister Plastic Industries failed to make payment as agreed. Therefore the appellant/plaintiff filed an action against all the three respondents/defendants in the Sessions Court, Kuala Lumpur claiming for a sum of RM43,383.23 (ie RM40,796.25 as principal amount and the balance as interest at the rate of 2% per month).

At the Sessions Courts, Kuala Lumpur, the appellant/plaintiff applied for an order under O 26A of the Subordinate Courts Rules 1980 ('the SCR'), for a summary judgment. The learned sessions court judge found that there were triable issues and accordingly dismissed the appellant/plaintiff's application on 7 December 2000.

The appellant/plaintiff then filed an appeal to the High Court. At the appeal stage, both parties made their respective oral submissions on 14 May 2002 before the judge in chambers. At the end of the proceeding, the court (on the same day) allowed the appeal with cost, but only for the sum of RM40,796.25 with interest from the date of the order (14 May 2002) at 8% until full settlement. A draft order was prepared by the appellant's counsel and sent to the respondent's counsel for approval. It was approved by the respondent's counsel and sent back to the appellant's counsel on 4 June 2002.

From the notes of proceedings, at the appeal stage before the judge in chambers, it appears that the appellant's counsel had informed the judge that there was no triable issues in the appellant's claim against the respondents as the respondents have not disputed the principal amount claimed; and that the respondents were only disputing the interest charged.

The appellant's counsel also told the court that the plaintiff (appellant) was willing to waive the entire interest claimed, and seek judgment for the principal sum. At one stage of the proceeding, the judge had recorded that the counsel for the respondents need not submit on the issue of interest because the plaintiff (appellant) has agreed to waive it.

On 20 June 2002, the applicant/plaintiff filed the present application.

Submissions by appellant's counsel

The appellant's counsel submitted that the 2% per month interest has been agreed by the parties in the sale letter dated 4 May 1998, and therefore the appellant is entitled to the amount charged. The appellant's counsel further submitted that issue relating to interest is not a triable issue. On the question that the said interest was waived, the appellant's counsel clarified that it was a mistake on the part of the counsel for the appellant (at the appeal stage before the judge in chambers on 14 May 2002) to waive the entire interest. The counsel concerned should have clarified to the judge that what he meant by waiving the interest is only referring to the post judgment interest, but not pre-judgment interest. The counsel concerned

had admitted the mistake in his affidavit in support of the present application (encl 9). A

The appellant's counsel also submitted that the respondents are liable to pay the appellant the interest charged and are not entitled to unjust enrichment by not paying the amount.

Submissions by respondents' counsel B

The respondents' counsel on the other hand argued that, from the notes of proceeding before the judge in chambers on 14 May 2002, the appellant counsel, at that time, had clearly and willingly informed the judge that the appellant was willing to waive the entire interest claimed. Therefore, the order made by the judge is good and effective. C

Further, the respondents' counsel also argued that the draft order was approved by the respondents' counsel and sent back by the respondents' counsel to the appellant's counsel and therefore, it was too late for the appellant to apply to this court to amend or vary the order.

Further, it was also argued that the present application, filed on 20 June 2002, was made more that one month after the date of the order. D

Finally, the respondents' counsel argued that the respondents had disputed the interest claimed right from the beginning of the proceeding. Therefore, if the appellant is allowed to amend or vary the order as applied, then the implication is that there are issues to be tried and the appellant is not entitled to a summary judgment as allowed by the court on 14 May 2002. E

Issues

The issues to be determined by the court in the present application are as follows: F

(i) whether this court has power to amend or vary its own decision which has been granted earlier; and

(ii) whether, on the facts and circumstances of the present case, the appellant's application might be granted. G

Findings of the court

It is now well settled that an order pronounced by a court can always be withdrawn, altered, or modified by the same court until it is drawn up, passed and perfected. It is also well settled that when a court has pronounced judgment, it retains control over the case until the order giving effect to its judgment is formally perfected; such control however, must be used in accordance with judicial discretion. The principle relating to the power of a court to recall an unperfected order has been laid down by the English Court of Appeal in *Re Harrison's Settlement* [1955] 1 All ER 185. This principle was followed by our Federal Court in the case of *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265. It was also followed by our High Court in *Syarikat Marak Jaya Sdn Bhd v Syarikat* H I

Masinda Sdn Bhd [1991] 2 MLJ 417; and *Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' (No 2)* [1998] 6 MLJ 492.

This power is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent or otherwise, so long the order has not been perfected, ie drawn up, passed and entered (see *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch D 273). In fact, Peh Swee Chin J in *Syarikat Marak Jaya* went a step ahead when his Lordship held that when an order is extracted or perfected, the court can still review the same but only with the consent of both parties or as expressly provided by the Rules of the High Court 1980 ('the RHC'), to give a few examples, in cases of setting aside judgment in default of appearance under O 13 r 9 of the RHC; setting aside judgment in default of pleadings under O 19 r 9 of the RHC; setting aside judgment in default of appearance at the hearing under O 14 r 11 of the RHC; or under O 20 r 11 of the RHC where the order does not correctly set out the manifest intention of the court.

The question of 'functus officio' does not arise at the stage when the order made is not perfected yet. In this respect, I am in full agreement with Kamalanathan Ratnam J, in '*Gang Cheng*', when his Lordship said (at p 497):

> It is my judgment that a matter or 'res' in relation to 'res judicata' is formally and finally decided or adjudicated by a court of law when the court's judgment, decision or order on the matter or 'res' is perfected, or in other words, passed and entered. I hold that only at that stage is a judge functus officio and is no longer seized of the matter and res judicata applies. Until this is done, the trial judge can vary, or modify his order or judgment.

An order is perfected when it is passed and entered by the court. In practice, when an order is pronounced by a court, one of the parties (usually in whose favor the order is granted) will prepare a draft order, send it to the other parties for approval or amendment (if any). After that, the draft order is sent to the court's registrar for approval. Once the order is approved by the court registrar, a fair or formal order is prepared and sent to the court registrar for attestation and court seal.

Only at that stage of the process can an order be said to have been passed and entered or perfected.

However, I must stress here that this power, ie to amend or vary an order earlier granted, is not without limitations. It must be exercised judicially and not capriciously. It must only be exercised in exceptional cases where the justice of the case requires.

In fact, Fox LJ in *Pittalis & Ors v Sherefittin* [1986] 2 All ER 227 has said that the power is to be exercised only in exceptional cases. At pp 234–235, he said:

> As a matter of the sensible administration of justice and fairness between parties, it seems to me proper in the circumstances that the judge should be at liberty to recall his order. The position can properly be called *exceptional.* (Emphasis added.)

In *Chua Wah Keow v Ng Ho Huat & Anor* [1961] 1 MLJ 321, Tan Ah Tah J (as he then was) said as follows (at p 322):

> It may perhaps be argued that the principle, laid down as it is in such wide terms, confers upon a judge an unlimited power to withdraw, or alter, or modify an order made by him which has not yet been perfected. But a perusal of the cases in which the power has been exercised indicates that the power is not as untrammelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced.

The above passage was adopted by Peh Swee Chin J in *Syarikat Marak Jaya* when he said the following at p 420:

> In my view, the nature of this power is not a blanket one; it is subject to a restriction which is, to correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order. The power is exercised concurrently with the express power to correct any clerical error, or any error arising from accidental slip or omission as expressly conferred by O 20 r 11 of the Rules of the High Court 1980.

Further, on the same page of the case, his Lordship went on to say:

> If such restriction does not exist, it will also somewhat destroy the fabric of the principle that there should be finality in litigation, for otherwise, the court may decide this way today and it may recall the parties and after further argument, decide in the opposite way tomorrow as was done in *Chuah Wah Keow v Ng Huat & Anor* [1961] MLJ 321, this would somewhat bring some disrepute to the court unless such radical change is expressly authorized by any other written law such as follows.

In *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705, the Court of Appeal held at p 706:

> As to the trial judge's view that he could reopen the matter because no order had been perfected, it is clear that these curative powers can only be exercised under the slip rule if it can be clearly shown that the unextracted order was wrongly worded and in some way did not truly represent what was actually decided.

In exercising the power to amend or vary an order, the court must look at the intention of the court in pronouncing the order. The court may exercise the power in order to bring it into harmony with the order which the court obviously intended or meant to pronounce. In *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717, it was held by the Court of Appeal, at p 726:

> It is now well settled, that until an order made by a judge has been perfected, by being passed and entered, there is no final order, and consequently the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make: see *Re Suffield & Watts; ex p Brown* (1888) 2 QBD 693; and no objection can therefore be taken, merely on the ground that the order, as drawn up, differs from the order that the learned judge originally stated he would make.

A In this respect, I am in full agreement with Kamalanathan Ratnam J in '*Gang Cheng*', when his Lordship said (at p 496):

> Surely, the court has an inherent power to vary its own order so as to carry out its own meaning and to express its meaning as plainly as possible. To do justice, it is necessary that the court be given a discretion to recall and correct any misgivings in its judgment before it is perfected, to bring it into harmony with the order which the court obviously meant to pronounce.

B

In exercising such power the court is not functus officio, as the order in question has not been perfected, and the court would hear it subject to the restrictions explained above.

C In the present case, it is not in dispute that the order in question dated 14 May 2002 has not yet been perfected. Even though the draft order was prepared by the appellant's counsel and later approved by the respondent's counsel, the draft order has not been passed and entered by the court registrar. Therefore, based on the abovecited authorities and subject to the limitations and restrictions explained above, I hold that this court has in D appropriate case, an inherent power to amend or vary its own order so long as the said order had not been perfected or passed and entered.

However, whether the court can grant the application as prayed or not, it must be determined on the facts and circumstances of the case. The court can only grant the application if justice of the case so requires, after taking into consideration all the relevant limitations and restrictions explained E above.

In the present case, the appellant's claim against the respondents is on the respondents' letter of guarantee in respect of goods supplied and delivered to their company, Meister Plastic Industries Sdn Bhd. The said company failed to pay for the said goods. At the Sessions Court, Kuala F Lumpur the appellant had applied for a summary judgment under O 26A of the SCR, but the application was dismissed. In order to obtain a summary judgment obviously the appellant has to convince the court (at the sessions court as well as in this court) that the appellant's case is a plain and obvious case and that there is no triable issues need to be tried. The respondents have all along disputed the claim particularly on the question G of interest, ie 2% monthly interest. The appellant's counsel was aware of this matter. In order to convince the court (at appeal stage before the judge in chambers on 14 May 2002), the appellant's counsel has informed the judge as follows (at p 3 of the notes of proceedings):

> H No triable issues. Defendants have not disputed the principal claim. They are only disputing the interest of less than RM3,000. We acknowledge that DN's (Debit Notes) at pp 35 and 36 charge interest at 30 days instead of 60 days. *Plaintiffs are willing to waive the entire interest claimed.* We seek judgment for the principal amount. Even if interest is at issue, computation would not be a triable issue. *Daya Amika* [1998] 6 MLJ 537. We have not indicated earlier our willingness to forgo interest. (Emphasis added.)

I At one stage of the proceedings when the respondents' counsel wanted to submit on the question of interest, the judge indicated, 'No need to submit on interest. Plaintiff has agreed to waive it.' (p 4 of the notes of

proceedings). At the end of the proceedings, the judge made the following order: A

> Appeal allowed with costs. But only for the sum of RM40,796.25 with interest from today at 8% until full settlement.

All these records clearly show that what the appellant's counsel told the judge is not slip of his tongue. It is not an accidental slip. He knew what he was saying and clearly meant it. Therefore the remedy under O 20 r 11 of the RHC does not apply. There is no error or accidental omission in the order as pronounced by the judge. The order pronounced clearly reflects what was intended or meant by the judge after being told by the appellant's counsel that 'the plaintiff was willing to waive the entire interest claimed.' The judge's attention was directed to the issue of interest which was entirely waived by the appellant and from the order pronounced, it is clear that the judge has applied his mind to that issue. The said order really expressed the court's intention in the matter or in other words it is conformable with such manifest intention of the court. Therefore, it is not proper, based on the abovecited authorities, for me to amend or vary the said order. In arriving at my view, I adopted a passage by Morton J in the case of *Re Inchcape (Earl of), Craigmyle v Inchcape* [1942] 1 Ch 394, as follows: B C D

> ... if a judge's attention is directed to a particular point, and, applying his mind to that point, he decides it, there can be no alteration under this rule even if the judge has fallen into manifest error. E

This passage was also adopted and applied by Ong Hock Thye FJ in *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 216.

From the records of the proceedings it seems that the appellant's counsel, in making such statements to the judge, had hoped to benefit from the statements so that the appellant's appeal can be allowed on ground that these was no triable issues, but subsequently he realized that such order (which was given based on what he had informed the judge) was financially onerous and later tried to amend or vary it. The effect of the amendment as prayed by the appellant is in total contradiction with what the appellant's counsel had informed the judge in getting the appeal allowed on 14 May 2002. Had the claim on interest not been waived by the appellant (as expressly informed by the appellant's counsel), the respondents might be allowed to submit on that point before the judge and the judge might not have decided in favor of the appellant in allowing the appeal. To allow the appellant's application under the present circumstances of the case would obviously prejudiced the respondents. The appellant may have double bites on both sides of the cake. F G H

The appellant's counsel in the present application raised the issue that the question of the 2% interest was agreed upon by the parties under the relevant agreement as well as under the letter of guarantee and therefore the appellant was entitled to the amount claimed. With respect, I am not able to accept this argument. The issue here is not whether the appellant is entitled to the interest claimed or not under the relevant agreement. The issue here is whether the appellant is entitled to a claim which he had I

willingly, effectively and voluntarily waived in a proceeding. The appellant may be entitled to the 2% interest under the relevant agreement, but at the same time, he may lose his entitlement if he willingly and voluntarily waived it. Under the circumstances, the question whether the appellant is entitled to the said interest under the relevant agreement does not arise anymore. Under the same circumstances, the question of 'unjust enrichment' on part of the respondents as alleged by the appellant, also does not arise.

The appellant's counsel admitted that he had made a mistake in waiving the said interest before the judge on 14 May 2002. Here, the issue of mistake was raised to support the present application to amend or vary the order.

In my view, reading closely the notes of proceedings before the judge on 14 May 2002, there is no question of mistake on part of the appellant's counsel when he informed the judge that the appellant 'willingly waived the entire interest claimed.' The counsel knew the nature and consequence of the statement. He knew what he meant. He knew what was he going to achieve by making such statements before the judge. Even if, it is considered as a mistake on part of the appellant's counsel, in my view, it is not within the scope of the power to amend or vary the order having regard to the circumstances of the case. In arriving at my view, I adopted the approach in *Syarikat Marak Jaya*, where Peh Swee Chin J held (at p 421):

> Having stated the above matters, in my view, the order in question in this instant case that was sought to be set aside on ground of misapprehension, mistake or fraud and being an unperfected consent order, was certainly not within scope of the power to rehear having regard to the grounds stated in the application. I therefore exercised my discretion in refusing to rehear and reopen the case relating to the order in question on the grounds of mistake, misapprehension etc.

Conclusion

Having considered the submissions and all the authorities submitted by both parties, it is my judgment that this is not a proper case for the court to exercise its discretion to amend or vary the order in question. I therefore dismissed the appellant's application (encl 10) with costs.

Appellant's application dismissed.

Reported by Lim Lee Na